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# In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 433

ALFRED SHYMAN, DOING BUSINESS UNDER THE ASSUMED NAME, BUSINESS AND STYLE OF ALASKA DISTRIBUTORS COMPANY, PETITIONER

*v.*

PHILIP B. FLEMING, TEMPORARY CONTROLS ADMINISTRATOR

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE RESPONDENT IN OPPOSITION

### OPINIONS BELOW

The opinion of the district court (R. 813–823) is not reported. The opinion of the circuit court of appeals (R. 831–837) is reported at 163 F. 2d 461.

### JURISDICTION

The judgment of the circuit court of appeals was entered August 15, 1947 (R. 838), and a petition for rehearing was denied October 8, 1947 (R. 839). The petition for a writ of certiorari was filed November 6, 1947. The jurisdiction of

this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

**QUESTIONS PRESENTED**

1. Whether petitioner's sales of the whiskey involved to purchasers in Alaska were export sales within the meaning of the Second Revised Maximum Export Price Regulation.

2. Whether it was correctly determined that the Second Revised Maximum Export Price Regulation, and not Maximum Price Regulation 194, was applicable to the sales in question.

3. Whether the fact that the Second Revised Maximum Export Price Regulation established merely a formula for calculating dollars-and-cents ceiling prices, and did not expressly fix such prices, prevented a determination that the prices charged by petitioner exceeded the ceilings so determinable.

4. Whether, in view of the fact that petitioner was entitled to secure an authoritative written interpretation, binding on the Administrator, as to what his dollars-and-cents ceiling prices were under the Second Revised Maximum Export Price Regulation, he could be heard to complain, after violation of the regulation, that the ascertainment of his ceilings from the formula provided was too complicated a process for him to have been expected to perform.

5. Whether the term "price at which the com-

modity was acquired" as used in Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation, defining one of two alternative "basic prices" to which an exporter might make certain designated additions in calculating his ceiling export prices, was intended to include an illegal, or over-ceiling price paid by the exporter for the commodity he exports.

6. Whether the fact that petitioner's overcharges were not wilful or the result of failure to take practicable precautions against making the overcharges was a bar to a judgment for the Government in the amount of the overcharges, no penalty in the way of treble damages being exacted.

7. Whether petitioner's contention that Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation, as construed below, operated to "compel changes in the business practices" of the liquor industry in Alaska, in violation of Section 2 (h) of the Emergency Price Control Act, constituted an attack on the validity of the regulation, cognizable only in the Emergency Court of Appeals.

8. Whether the Government's recovery against petitioner of the amount of petitioner's overcharges, as well as the recovery against petitioner's supplier of the amount of the latter's overcharges on the same whiskey, constituted a double recovery upon the same transaction.

STATUTE AND REGULATIONS INVOLVED

Section 205 (e) of the Emergency Price Control Act of January 30, 1942, c. 26, 56 Stat. 23, as amended by the Act of June 30, 1944, c. 325, title I, § 108 (b), 58 Stat. 632 (50 U. S. C. App., Supp. V, 925 (e)), provided in pertinent part as of July 31, 1944, the date of the institution of the proceeding involved herein:

> If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, the person who buys such commodity for use or consumption other than in the course of trade or business may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is the greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: *Provided, however,* That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order, or price schedule in question was

> neither willful nor the result of failure to take practicable precautions against the occurrence of the violation. * * * If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and the buyer either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States within such one-year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. A judgment in an action for damages under this subsection shall be a bar to the recovery under this subsection of any damages in any other action against the same seller on account of sales made to the same purchaser prior to the institution of the action in which such judgment was rendered.

The Second Revised Maximum Export Price Regulation (8 F. R. 4132) provided in pertinent part, during the period of the alleged overcharges involved herein (April to September 1943):

> Sec. 3. *Maximum export prices for export sales* * * *. On and after April

5, 1943, * * * no exporter or other seller in a transaction dealt with below shall sell, offer to sell, transport, ship, or participate in the transportation or shipment of, any commodity at a price in excess of the following maximum prices:

(a) In the case of an exporter other than the manufacturer or producer of the commodity the maximum export price shall be either:

(1) The price at which the commodity was acquired or the maximum domestic price which would be applicable to a current sale of the commodity to the exporter by the supplier thereof, plus the additions thereto authorized by paragraphs (a) and (b) of section 4 and less the deductions provided by section 5 (a); * * *.

* * * * *

Sec. 4. *Export premiums and allowable expenses on export sales* * * *. (a) An amount * * * not in excess of 125 per cent of the average premium charged in the export trade during the period July 1 to December 31, 1940 for the particular services or functions performed, or 125% of the average premium charged in the export trade during the period March 1 to April 15, 1942, for the particular services or functions performed, whichever figure is the lower, may be added by the exporter to his maximum domestic price or other basic price, as provided in section 3 of this regulation. * * *

(b) An amount may be added by the ex-

porter to his basic price to compensate for expenses, such as freight, marine and war risk insurance, consular fees, freight forwarders' fees, packing costs in excess of those incurred on domestic sales, demurrage charges, and other shipping charges, incident to exporting the commodity and incurred or to be incurred by the exporter. * * *

* * * * *

Sec. 11. *Definitions.* (a) When used in this maximum export regulation the term:

(1) "Export" or "export sale" means:

(i) Any sale of a commodity by a seller or his agent in the continental United States to a purchaser outside thereof in which the selling or invoicing is done in the continental United States, or is done outside the continental United States on behalf of a principal or parent firm in the continental United States, and the commodity sold is or has been transported from the continental United States to a point outside thereof;

* * * * *

(3) "Continental United States" means only the forty-eight States and the District of Columbia.

* * * * *

(7) "Basic price" shall mean the cost of acquisition or other domestic price referred to in section 3 of this regulation.

* * * * *

Maximum Price Regulation 194 (7 F. R. 5909),

as amended (8 F. R. 856), provided in pertinent part during the period of the alleged overcharges involved herein:

> § 1418.61 *Applicability of other maximum price regulations.* The provisions of this Maximum Price Regulation No. 194 supersede the provisions of all other maximum price regulations, except where other maximum price regulations provide that notwithstanding Maximum Price Regulation No. 194 such other regulations shall be applicable in the Territory of Alaska.
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> * * * * *
>
> § 1418.63 *Definitions.* When used in this Maximum Price Regulation No. 194, the term:
>
> * * * * *
>
> (5) "Sales and deliveries to a buyer in the Territory of Alaska" does not include sales from a seller outside the Territory of Alaska to a purchaser in the Territory of Alaska. Export sales, from a seller in the Continental United States to a purchaser in Alaska shall be governed by the maximum prices established for export sales by the Revised Maximum Export Price Regulation.
>
> * * * * *

Revised Procedural Regulation 1 (7 F. R. 8961) provided in pertinent part during the period of the alleged overcharges involved herein:

> § 1300.51 *Interpretations.* An interpretation rendered by an officer or employee

of the Office of Price Administration with respect to any provision of the Act or of any regulation, price schedule, order, requirement, or agreement thereunder, will be regarded by the Office of Price Administration as official only if such interpretation was requested and issued in accordance with § 1300.52 of this regulation. Action taken in reliance upon and in conformity with an official interpretation and prior to any revocation or modification thereof or to any superseding thereof by regulation, order or amendment, shall constitute action in good faith pursuant to the provision of the Act, or of the regulation, price schedule, order, requirement or agreement to which such official interpretation relates. An official interpretation shall be applicable only with respect to the particular person to whom, and to the particular factual situation with respect to which, it is rendered, unless publicly announced as an interpretation of general application.

§ 1300.52 *Requirements governing interpretations*—(a) *Requests for interpretations; form and contents.* Any person desiring an official interpretation of the Emergency Price Control Act of 1942 or any regulation, price schedule, order, requirement or agreement thereunder, shall make a request in writing for such interpretation. Such request shall set forth in full the factual situation out of which the interpretative question arises and shall, so far as is practicable, state the names and

post office addresses of the persons involved. If the inquirer has previously requested an interpretation on the same or substantially the same facts, his request shall so indicate and shall name the official or office to whom his previous request was addressed. * * *

(b) *Interpretation to be written; authorized officials.* Official interpretations shall be given only in writing, signed by one of the following officers of the Office of Price Administration: the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, any Regional Attorney, any Regional Price Attorney, any State Attorney, or State Price Attorney and any Chief Attorney or Chief Price Attorney for a District Office: *Provided,* That interpretations of general application shall be announced only by the Price Administrator, the General Counsel, any Associate or Assistant General Counsel, or any Regional Attorney. * * *

**STATEMENT**

On July 31, 1944, the Price Administrator filed an amended complaint in the District Court for the Western District of Washington, pursuant to Section 205 (e) of the Emergency Price Control Act of 1942, as amended (*supra,* pp. 4–5), alleging export sales of "Tom Burns" whiskey by petitioner at prices in excess of the maximum prices established by Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation

(*supra,* pp. 5–6), and praying for the recovery of treble the alleged overcharges of $53,708.49, or $161,125.47 (R. 5–9).[1]

Following a trial before the court without a jury, the district court found that petitioner was, during the period of the alleged overcharges (April to September 1943), a resident of Seattle, Washington, engaged in the business of exporting "Tom Burns" whiskey to purchasers in Alaska (Finding of Fact III, R. 57–58); that the provisions of the Second Revised Maximum Export Price Regulation applied to the shipment and sale of the whiskey to such Alaska purchasers and that petitioner was permitted to charge these purchasers no more than the prices established by that regulation (Finding of Fact V, R. 58); that under the provisions of the regulation, the total maximum export price chargeable by petitioner to the Alaska purchasers was $242,034.76 (Finding of Fact IX, R. 61); that the total prices actually charged by petitioner between April 29 and September 1, 1943, amounted to $263,844.65 (Finding of Fact VII, R. 59–60); that the amount received by petitioner from these sales exceeded the lawful ceilings by $21,809.89 (Finding of Fact

[1] The complaint also sought injunctive relief against further violations, under Section 205 (a) of the Act (50 U. S. C. App., Supp. V, 925 (a)), but this aspect of the complaint need not be considered, since the cessation of price control over sales of whiskey has, as the court below points out (R. 837), rendered moot questions raised as to the injunctive relief granted by the district court.

X, R. 61); and that none of the overcharges were wilful or the result of failure to take practicable precautions against making them (Finding of Fact XI, R. 61). The court concluded that the Government should have judgment for "single the amount of said overcharges," or $21,809.89 (R. 62). On appeal, this judgment was affirmed (R. 838).

Other pertinent facts are stated in the Argument, *infra*, keyed to the contentions to which they are relevant.

**ARGUMENT**

1. Petitioner contends, as he did in both courts below, that his sales to his Alaska customers were not export sales, but sales consummated within the Territory of Alaska, and that therefore the Second Revised Maximum Export Price Regulation did not apply to them. His theory is that K & L Distributors, Seattle wholesale liquor dealers from whom he bought the whiskey, exported it to him in Alaska and that his sales occurred entirely within Alaska. (Pet. 39–49; see R. 35.) The contention is without merit.

Section 11 of the Second Revised Maximum Export Price Regulation (*supra*, p. 7) defined an "export sale" to mean "Any sale of a commodity by a seller or his agent in the continental United States [defined as "the forty-eight States and the District of Columbia"] to a purchaser outside thereof in which the selling or invoicing is

done in the continental United States, * * * and the commodity sold is or has been transported from the continental United States to a point outside thereof." That petitioner's sales fell squarely within this definition is clear both from the stipulated facts and from the evidence adduced at the trial.

It was stipulated prior to the trial that petitioner was a resident of Seattle and maintained an office there (R. 37); that he purchased the whiskey in question from K & L Distributors in Seattle and received it in Seattle (R. 37–38); that the shipping documents covering the whiskey were turned over to petitioner in Seattle (R. 49); that petitioner owned the whiskey prior to its shipment to Alaska and that it was withdrawn from a bonded warehouse in Seattle on petitioner's orders and thereafter shipped to purchasers in Alaska in shipping space secured by petitioner at Seattle (R. 38–39, 50); that the original bills of lading covering the whiskey were forwarded by the warehouse to petitioner in Seattle, whence petitioner forwarded them to his customers in Alaska (R. 51); that the billing and invoicing to the Alaska purchasers was done by petitioner in Seattle (R. 39); and that the proceeds of such sales were remitted to petitioner at his office in Seattle (R. 39).

In addition to these stipulated facts, the following evidence was adduced at the trial. On petitioner's application, dated June 11, 1940, for a

wholesaler's basic permit under the Federal Alcohol Administration Act as successor in interest to Alaska Distributors, Inc., petitioner referred to himself as "A. Shyman, sole proprietor with principal office at 911 Western Avenue, Seattle, Washington" (Plaintiff's Ex. 8).[2] Petitioner was a successor to Alaska Distributors, Inc., a corporation formed under the laws of Washington in 1934 (R. 416) and under petitioner's prior control (R. 400). Petitioner's alleged principal Alaskan agent, one Meherin, listed his own name on order blanks, followed by the designation, "Merchandise Broker, Juneau, Alaska," and wrote orders in his own name, not as petitioner's agent (R. 419, 427). Petitioner's name was not even in the telephone directory in Juneau, Alaska, where his main office was alleged at the trial to be located (R. 418). Petitioner's standard letterhead read, "Alaska Distributors Company,[2] Importers, Wholesalers, Distillery Representatives, Maritime Building * * * Seattle, Washington" (R. 419). Petitioner kept no warehouse stocks in Alaska (R. 430). He paid social security taxes to the State of Washington on the salaries of three employees he had in his Seattle office (R. 433). His office expenses in Seattle were considerably more than in Juneau, Alaska (R. 434). On his application, dated December 30, 1942, for renewal of his whole-

[2] The exhibits are on file with the circuit court of appeals. It is stated in respondent's brief below that this exhibit contains the quoted language.

sale liquor license in Alaska, in response to the question as to how long he had been a resident of the "Territory of Alaska," petitioner merely wrote "Seattle, Washington" (Shyman Ex. 23, R. 47).

It is clear, therefore, that the sales here involved were not sales by a seller in Alaska to buyers in Alaska, but sales by a seller in Seattle to purchasers outside continental United States in which "the selling or invoicing" was done in continental United States, and hence were "export sales" within the definition of that term as used in the Second Revised Maximum Export Price Regulation. The district court summarized in detail the pertinent evidence (R. 813–815) and stated as its "finding, conclusion and decision" that petitioner was "at all times material to these actions doing business as an exporter in Seattle, Washington" (R. 813; see also Finding of Fact III, R. 57–58). This finding, as we have shown, is clearly supported by the evidence and must, therefore, be sustained. Rule 52 (a), F. R. Civ. P., 28 U. S. C. following § 723 c.[3]

[3] Petitioner insists, however, that if his sales to his Alaska customers be construed as export sales, the sales to him by his supplier, K & L Distributors, must necessarily be deemed to have been domestic sales consummated in the State of Washington; that under the laws of Washington, a "monopoly" state, such domestic sales could legally be made only by the State Liquor Control Board; that the finding that petitioner's sales were export sales, therefore, necessarily involved a determination that K & L Distributors violated state law; and that, consequently, the finding was erroneous (Pet. 39–49). This contention is clearly without merit.

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2. Petitioner further contends that the district court erred in determining that the Second Revised Maximum Export Price Regulation applied to his sales to Alaska purchasers because an entirely different regulation, Maximum Price Regulation 194, was applicable to sales in Alaska (Pet. 19–21, 89–94). This contention is likewise unsound, since § 1418.63 (5) of Maximum Price Regulation 194 (*supra*, p. 8) specifically provided that " 'Sales and deliveries to a buyer in the Territory of Alaska' does not include sales

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Section 49 of the Washington State Liquor Act (Rem. Rev. Stats. (Supp.), § 7306–49) provides that "Nothing in this act shall prevent the transshipment of liquor in interstate and foreign commerce." The sales of the liquor in question by K & L Distributors to petitioner were specified to be "For export to Alaska only" (R. 177, 339, 364, 397). It was stipulated, moreover, that upon arrival of the liquors in question in Seattle they "were warehoused in their original packages as provided by the rules and regulations of the Washington State Liquor Control Commission and the laws of the State of Washington"; that the liquor was thereafter segregated into lots by petitioner in conformity with the orders forwarded by petitioner's agents in Alaska and shipped to the Alaska purchasers; and that none of the liquor in question "was consumed or used in the State of Washington, nor sold to anyone for use in the State of Washington" (R. 42). Clearly, therefore, there is no basis for concluding that, under the district court's interpretation of petitioner's sales as export sales, the sales by K & L Distributors to petitioner necessarily violated Washington's liquor laws, since those sales were made for immediate resale outside of Washington. And in any event, even assuming, *arguendo*, that the sales to petitioner were necessarily in violation of Washington law if the sales by petitioner were export sales, it obviously does not follow from that fact that petitioner's sales could not be found to be export sales where, as here, the evidence was overwhelming that they were such.

from a seller outside the Territory of Alaska to a purchaser in the Territory of Alaska. Export sales, from a seller in the Continental United States to a purchaser in Alaska shall be governed by the maximum prices established for export sales by the Revised Maximum Export Price Regulation." The Second Revised Maximum Export Price Regulation was, of course, merely a revision of the regulation thus specifically declared to be applicable to export sales to Alaska.[4]

3. Petitioner further contends that, since neither the Second Revised Maximum Export Price Regulation nor any written order thereunder established dollars-and-cents ceiling prices for the export sale of whiskey, there could exist no valid basis for the charge that he violated the regulation (Pet. 31–39). The regulation, however, set up a formula for calculating dollars-and-cents ceiling prices, and that was enough. *Martini* v. *Porter,* 157 F. 2d 35, 39 (C. C. A. 9), certiorari denied *sub nom. Martini* v. *Fleming,* 330 U. S. 848. Manifestly, the mere fact that the Admin-

[4] Petitioner insists (Pet. 20–21), however, that § 1418.61 of Maximum Price Regulation 194, which was added by Amendment No. 10 (8 F. R. 856), and provided that "The provisions of this Maximum Price Regulation No. 194 supersede the provisions of all other maximum price regulations, except * * *" (*supra*, p. 8), had the effect of canceling the provision contained in § 1418.63 (5). But the obvious purpose of § 1418.61 was to make Maximum Price Regulation 194 the only regulation applicable to those sales in Alaska which were covered by it. That regulation plainly did not purport to apply to export sales to Alaska, as shown by the clear terms of § 1418.63 (5).

istrator had specified dollars-and-cents ceiling prices in other regulations did not, as petitioner seems to assume (Pet. 32–34, 39), make the establishment of dollars-and-cents ceiling prices essential to the validity of all maximum price regulations. Furthermore, as pointed out by the court below (R. 833–834), and notwithstanding petitioner's present assertion that the court below misconceived the nature of this contention (Pet. 31–32), the "gist of this argument is that the Administrator was without power to establish maximum prices by formula, * * *. A short answer to the argument is that it amounts to an attack on the validity of the regulation cognizable only in the Emergency Court of Appeals." See *Bowles* v. *Seminole Rock Co.,* 325 U. S. 410, 418–419; *Yakus* v. *United States,* 321 U. S. 414, 427–431.

4. It was stipulated prior to the trial that petitioner's sales of whiskey to his Alaska customers consisted of 2,264 cases of fifth-gallons at $33.10 per case, 1,500 cases of quarts at $40.55 per case, and 3,105 cases of pints at $41.25 per case (R. 38). Patrick Geraghty, an O. P. A. price attorney (R. 713), testified that, using "the maximum domestic price which would be applicable to a current sale of the commodity to the exporter by the supplier thereof" (the second alternative "basic price" that an exporter might use under Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation, *supra,* p. 6) as the

"basic price" applicable to export sales of the whiskey involved (see R. 753–754, 756–757), the prices actually charged by petitioner exceeded his legal ceilings by $2.51 per case for the fifth-gallons, $3.61 per case for the quarts, and $3.45 per case for the pints, amounting to a total overcharge, for all cases of all types, of $21,809.89 (R. 766–768). This total overcharge was the amount of overcharge found by the court (Finding of Fact X, R. 61) and awarded as damages (R. 62). Geraghty's determination of the overcharges necessarily involved a number of mathematical calculations (see R. 719–755, 763–768). Petitioner contends that, because of the complicated nature of the mathematical processes required to be applied to arrive at the amount of his total overcharge and because there had been differences of opinion among different O. P. A. attorneys as to the exact amount of his overcharges,[5] he was entitled, prior to his making of

[5] Geraghty's figure of $21,809.89 as the amount of petitioner's overcharges, which amount the court accepted as the actual overcharge, was lower than the figure arrived at by any other O. P. A. attorney (see Pet. 52–53). The figure "$19,542.12," which petitioner states was Geraghty's result "if $1.25 was added to basic price and mark-up allowed thereon" (Pet. 53), was reached in answer to a hypothetical question of petitioner's counsel which assumed that the amount authorized by Section 4 (b) of the Second Revised Maximum Export Price Regulation (*supra*, pp. 6–7) to be added to the "basic price" defined in Section 3 (a) (1) was to be added before taking the percentage mark-up specified in Section 4 (a) (see R. 757–761). However, Geraghty testified that this assumption involved an incorrect interpretation of

the sales in question, to "a written interpretation by some authorized O. P. A. official" advising him of his legal dollars-and-cents ceilings under the law, and should not have been required to wait until the trial to be advised of what his ceilings were (Pet. 50–53) . As the court below pointed out (R. 834), however, in answer to petitioner's contention that "the formula prescribed was so vague and complex that [he] was unable to ascertain the applicable ceiling prices for his product," petitioner could at any time have applied to the Administrator for an authoritative written interpretation, binding on the Administrator, to resolve his uncertainty. See Revised Procedural Regulation 1, §§ 1300.51, 1300.52, *supra,* pp. 8–10; *Diven* v. *Porter,* 157 F. 2d 593, 595 (C. C. A. 8); *Mechanical Farm Equipment Distributors* v. *Porter,* 156 F. 2d 296, 298 (C. C. A. 9), certiorari denied, 329 U. S. 771; *Schreffler* v. *Bowles,* 153 F. 2d 1, 4 (C. C. A. 10), certiorari denied, 328 U. S. 870; *Alan Levin Foundation* v. *Bowles,* 152 F. 2d 467, 472 (E. C. A); *Bowles* v. *Indianapolis Glove Co.,* 150 F. 2d 597, 601 (C. C. A. 7), certiorari denied, 326 U. S. 794; *Wells Lamont Corporation* v. *Bowles,* 149 F. 2d 364, 367 (E. C. A.), certiorari denied, 326 U. S. 730. Since he chose not to do so, he cannot now be heard to complain that the

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the order in which the additions defined in Sections 4 (a) and 4 (b) were to be made (R. 759). It seems plain that Geraghty's interpretation—that the 4 (a) mark-up was to be taken before the 4 (b) addition—is the only correct one.

ascertainment of his dollars-and-cents ceilings was too complicated a process for him to have been expected to perform. Furthermore, the court awarded as damages only the exact amount of the overcharge, and did not penalize petitioner by the exaction of treble damages. Hence, petitioner clearly has no cause for complaint, since the judgment of the court merely compelled him to surrender that which he had unlawfully received and to which he was never entitled. *Diven* v. *Porter, supra,* 595.

5. Petitioner next contends that, even though his sales to his Alaska customers may have been at prices in excess of the lawful ceilings determinable under Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation if the second, or "maximum domestic price" alternative is used as the basic price to which the indicated additions might lawfully be made, his prices were below the legal ceilings determinable by using the first (i. e., the "price at which the commodity was acquired") alternative basic price (Pet. 49–87).[6]

[6] The purpose of giving an exporter this choice of basic prices was to protect him against the possibility of a reduction in the maximum domestic price legally chargeable for the commodity in question between his acquisition of the commodity and his shipment thereof out of the country. The Third Revised Maximum Export Price Regulation eliminated the "cost of requisition" optional basic price (see 11 F. R. 9069, 9070). The Statement of Considerations for the latter regulation stated (3 Pike and Fischer O. P. A. Price Service (General Desk Book) 15,227):

"The old regulation protected an exporter who purchased

However, the prices at which petitioner purchased the whiskey from his supplier, K & L Distributors, were themselves above-ceiling prices, and hence illegal (R. 818, 820, 834–835). Petitioner points out that the first alternative basic price provided for in Section 3 (a) (1) read, "The price at which the commodity was acquired" and did not by its terms exclude an over-ceiling price (Pet. 61). "It would have been a simple matter," petitioner reasons, "to insert the word 'legal' in the context of Sec. 3 (a) (1) to read 'The (legal) price at which the commodity was acquired' if the Administrator had intended to bar Petitioner, or others" (*ibid.*). Thus, petitioner's contention, in substance, is that the first alternative basic price defined in Section 3 (a) (1) must be construed as though it read "The price at which the commodity was acquired, whether that price was legal or illegal." The contention is palpably unsound for several reasons.

(a) First, the Regulation must be read in the light of the language of the Act itself, which defines "maximum price" as the "maximum lawful price" chargeable for a commodity (Section 302 (i), 50 U. S. C. App., Supp. V, 942 (i)).

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a commodity for shipment and thereafter before shipment found that basic maximum prices were reduced. With the shipping situation returning to normal this protection is no longer considered necessary and therefore the option of using the cost of acquisition as a basis in computation of maximum export prices has been eliminated."

(b) Secondly, Section 4 (a) of the Act (50 U. S. C. App., Supp. V, 904 (a)) prohibits not only the sale, but likewise the purchase of a commodity in excess of the maximum prices established by a regulation. Under petitioner's theory, a purchaser who "joyfully may have aided the seller in violating the law" (*Porter* v. *Crawford & Doherty Foundry Co.*, 154 F. 2d 431, 434 (C. C. A. 9), certiorari denied, 329 U. S. 720) would nevertheless be permitted to benefit from his own wrong. Indeed, petitioner's view would necessitate the anomalous conclusion that a person would be criminally liable under Section 205 (b) of the Act (50 U. S. C. App. Supp. V, 925 (b)) for a wilful "purchase" contrary to Section 4 of the Act (see *United States* v. *Lutz*, 142 F. 2d 985, 989 (C. C. A. 3)), and yet at the same time be wholly free from civil liability upon a resale. Clearly, if a purchaser unlawfully pays more than the ceiling price for a commodity and thereby invokes criminal sanctions, the unlawful character of the price paid is not lost in any way when passed on to another purchaser so as to bar resort to civil damages. The contrary is the case, since such a purchaser not only violates the law himself, but furnishes to other "dealers a motive to violate the statute themselves" (*Batson* v. *Porter*, 154 F. 2d 566, 568 (C. C. A. 4)).

(c) Thirdly, if petitioner's construction of the regulation were correct, it would not only have been to his advantage to pay illegal prices for

whiskey in a scarce market in order to obtain it to the exclusion of others who were willing to pay only the ceiling price, but there would have been the additional advantage of receiving larger dollar profits on resales. For, under petitioner's view, the mark-up or export premium permissible on export sales under Section 4 (a) of the regulation (*supra*, p. 6) could be placed upon the excess price paid by petitioner to his supplier instead of upon the ceiling price at which the latter was lawfully entitled to sell to petitioner. Hence, if petitioner's interpretation of Section 3 (a) (1) is correct, there would have been every incentive to exporters to encourage their suppliers to sell to them at over-ceiling prices, or at least close their eyes to such violations, instead of cooperating in the fight against inflation, since they would have had everything to gain and nothing to lose by such a course of conduct.

(d) Finally, petitioner's interpretation of the meaning of the term "price at which the commodity was acquired," as used in Section 3 (a) (1), is directly refuted by an official published interpretation which has been in existence since November 25, 1942. This interpretation, referred to as RPI [Recent Price Interpretation] No. 17, was issued in connection with Revised Maximum Export Price Regulation, and is published in 3 Pike and Fischer O. P. A. Service 20: 303–304 (see R. 696). It reads as follows:

> *Cost of acquisition—illegal price.* A non-manufacturing exporter, in figuring his cost of acquisition, may not use a price which violated a domestic Regulation at the time he purchased the commodity. The provision, in the Regulation referring to "the price at which the commodity was acquired for export" does not include an illegal price.

While it is true that this interpretation was not published in the Federal Register, there is no requirement that it must have been so published to permit resort to it as an aid in determining the intent of Section 3 (a) (1). Compare *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 417, where a bulletin issued by the Price Administrator, but which was not published in the Federal Register, was considered as an aid to ascertaining the Administrator's intent.

For the above reasons, as well as for the reasons mentioned in the opinion below, the circuit court of appeals was clearly correct in ruling that "the phrase 'the price at which the commodity was acquired' cannot fairly be construed to include an over-ceiling price" (R. 835).

6. There is no merit in petitioner's further contention that "The present decision gives no consideration to the good faith exercised by Petitioner in this case" (Pet. 21, 95–106). Section 205 (e) of the Emergency Price Control Act (*supra*, pp. 4–5), under which the proceeding involved was brought, makes a seller who has sold

at over-ceiling prices liable for an amount up to treble the amount of the overcharge, the exact amount to be fixed at the court's discretion, with the proviso, however, that the amount recoverable "shall be the amount of the overcharge * * * if the defendant proves that the violation of the regulation, order, or price schedule in question was neither wilful nor the result of failure to take practicable precautions against the occurrence of the violation." The district court found that petitioner's overcharges were not wilful or the result of failure to take practicable precautions (Finding of Fact XI, R. 61), and accordingly gave judgment for "single the amount of said overcharges" (R. 62). Manifestly, therefore, the judgment was fully authorized by the statute, and petitioner has been required to surrender only the amount which he unlawfully received and to which he was never entitled.[7]

[7] Petitioner's contention that he should have been allowed an offset of $18,020.25 against the judgment for overcharges because he sold other whiskey than that here involved at prices lower than his legitimate ceilings as the result of receiving erroneous advice from an O. P. A. attorney in respect of such ceilings (Pet. 103–106) is equally without merit. Petitioner did not inquire of any O. P. A. representatives concerning the proper method by which to establish ceiling export prices on this whiskey until August 14, 1943, by which time most of the sales involved in this case had been completed (R. 624–625). Shortly before this date, on August 7, 1943, K & L Distributors had advised petitioner that his prices to Alaska purchasers had been illegal (R. 624). During the entire period, as we have pointed out above (*supra*, p. 20), petitioner had it within his power to apply in

7. Petitioner further contends (Pet. 106–107) that Section 3 (a) (1) of the Second Revised Maximum Export Price Regulation, as construed, operated to "compel changes in the business practices" of the liquor industry in Alaska, in violation of Section 2 (h) of the Act (50 U. S. C. App., Supp. V, 902 (h)). It is unnecessary to consider the merits of such a charge, however, since, as the court below points out (R. 836), "the argument amounts to an attack on the validity of the regulation. Such an attack is cognizable only in a proceeding in the Emergency Court [of Appeals]." See *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 418–419; *Yakus* v. *United States*, 321 U. S. 414, 427–431. Petitioner's rejoinder that "no opportunity to use the right to appeal to the Emergency Court of Appeals was vouchsafed to Petitioner prior to the institution of the enforcement suit" (Pet. 107) is obviously meritless in view of the explicit terms of Section 204 (e) (1) of the Act (50 U. S. C. App., Supp. V, 924 (e) (1)), providing that "* * * within five days after judgment in any civil or criminal proceeding, brought pursuant to section 205 [the section under which the instant proceeding was instituted] involving alleged violation of

writing for an official written interpretation binding upon the Administrator and was not compelled to rely on the alleged oral conversations. The consequences flowing from petitioner's failure to do what the law required can, therefore, be placed upon no one but himself.

any provision of any regulation or order * * * or of any price schedule * * *, the defendant may apply to the court in which the proceeding is pending for leave to file in the Emergency Court of Appeals a complaint against the Administrator setting forth objections to the validity of any provision which the defendant is alleged to have violated." Clearly, therefore, petitioner had ample opportunity to contest the validity of the regulation in question before the Emergency Court of Appeals if he desired to do so.

8. Finally, petitioner contends that it was error for the district court to permit the Government "to collect twice for overcharges upon the same transaction" (Pet. 107–111). This contention is based on the fact that in a proceeding against petitioner's supplier, K & L Distributors, which action was consolidated for trial with the instant action (R. 157, 164), and which also resulted in a judgment for the Government, the alleged violation consisted of overcharges in the sales made by K & L Distributors to petitioner of the same whiskey as that involved in the present case (R. 837). While the whiskey involved in the two proceedings was the same, however, the two causes of action obviously arose from entirely different transactions and related to different persons. The two cases, moreover, involved different regulations. The regulation involved in the proceeding against K & L Distributors was Order No. 3 to

Maximum Price Regulation 193 (R. 158), whereby maximum domestic prices were established on the specific brand of whiskey, Tom Burns, involved herein (R. 58–59). In the instant case, as we have seen, the violations arose from the fact that petitioner exported the whiskey to purchasers outside the continental limits of the United States at prices in excess of those determinable from the Second Revised Maximum Export Price Regulation. Petitioner's contention is without merit, therefore, since a "separate and distinct primary right of the government was involved" in each case. *United States* v. *Pan-American Petroleum Co.*, 55 F. 2d 753, 777 (C. C. A. 9), certiorari denied, 287 U. S. 612.

## CONCLUSION

The petition for a writ of certiorari presents no question requiring further review by this Court. We therefore respectfully submit that it should be denied.

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